DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA, and THE PEOPLE OF THE VIRGIN ISLANDS	)	
Plaintiffs,	)	
v.	)	**Criminal No. 2009-32**
ENRIQUE SALDANA, GEORGE GREENE, JR., and LOUIS ROLDAN,	)	
Defendants.	)	

ATTORNEYS:

Kim R. Lindquist, AUSA
Nolan D. Paige, AUSA
St. Thomas, U.S.V.I.
For the plaintiffs.

Darren John-Baptiste, Esq.
Joseph A. DiRuzzo, III, Esq.
St. Thomas, U.S.V.I.
For the defendant Enrique Saldana.

Thurston T. McKelvin, FPD
Gabriel Villegas, AFPD
St. Thomas, U.S.V.I.
For the defendant George Greene.

George H. Hodge, Jr., Esq.
St. Thomas, U.S.V.I.
For the defendant Louis Roldan.

MEMORANDUM OPINION

GÓMEZ, C.J.

Before the Court are the motions of defendants Enrique Saldana ("Saldana"), George Greene, Jr. ("Greene"), and Louis Roldan ("Roldan") (jointly, the "defendants") for a new trial. The defendants claim they were denied their Sixth Amendment right to a public trial. The government opposes the defendants' motions.

I. FACTS

The facts of the underlying criminal charges in this matter are of little moment to the constitutional question presented. In short, Saldana and Greene are members of the Virgin Islands Police Department, who, along with Roldan, were charged with conspiring to extort a cash payment from a dealer of fake narcotics (the "extortion matter"). Greene was also charged with firearms violations (the "firearms matter"). Greene's gun charges were severed from the other charges in the indictment.

The defendants move for judgments of acquittal on substantive grounds. Those motions will be addressed in a separate opinion. For purposes of this opinion, the Court will consider only the defendants claim that the public was excluded from the trial in this matter, resulting in Sixth Amendment

violations. As a result, they seek new trials. The government asserts that the defendants forfeited their Sixth Amendment claims by not raising the objections at trial.

The parties' positions on the alleged Sixth Amendment violations are relatively clear. There is anything but clarity on review of the relevant facts, however. On the one hand, the defendants have captured and presented clear evidence that several individuals were under the impression that they were not to be in the courtroom at certain times. Unearthing the bases for that impression is far more elusive. The Court's task is confounded because some of the witnesses presented by the defendants testified about a version of events that either: conflicts with other defense witnesses; conflicts with government witnesses; or is internally inconsistent. Notwithstanding those conflicts, the record reveals the following.

The extortion matter proceeded to trial in December of 2009. The jury was unable to reach a verdict, and the Court declared a mistrial.

On January 20, 2010, Greene's firearm matter proceeded to trial. Greene was convicted on the gun charges.

On January 25, 2010 the extortion re-trial of all three defendants began. The jurors were summoned to be at the courthouse at 8:00 a.m. Jury attendance proceeded from that time

until 10:00. At the conclusion of jury attendance, the judge was called to the courtroom. Jury selection in the extortion retrial commenced at approximately 10:00 a.m and ended at 11:47 a.m.

On January 28, 2010, while the extortion trial was ongoing, Greene filed a motion for a new trial on the gun charges. He claimed members of the public were excluded from the courtroom during *voir dire*. In support of that allegation, Greene submitted the affidavits of two of his family members, one of which was later withdrawn as inaccurate.

On January 29, 2010, after a five-day re-trial in the extortion matter, the defendants were convicted on nearly all of the charges that went to the jury.[1] On February 12, 2010, both Greene and Saldana filed motions for a new trial, claiming that members of the public were denied access to the courtroom during *voire dire* of the extortion re-trial. Roldan later joined those motions.

The Court held an evidentiary hearing to determine whether the public was excluded from the courtroom during the jury selection for the gun trial[2] or the extortion re-trial. At that

---

[1] Greene was acquitted of making a false statement and of money laundering.

[2] Judge John E. Jones presided over the gun trial. On July 6, 2010, Judge Jones issued a Memorandum Opinion and Order addressing the Sixth Amendment public trial issue with respect to the gun trial. This Memorandum Opinion addresses the public exclusion challenge with respect to the extortion

hearing, which spanned two days, all three defendants called witnesses, as did the government, and the Court itself.

Several witnesses testified that they were told that they could not enter or remain in the courtroom on the morning of January 25, 2010. Lorecia Krigger-Stephens ("Krigger-Stephens"), whose niece is engaged to Greene, testified that when she was sitting in the courtroom, she was told by someone who she believed to be court personnel "You all can't be there" and was ushered out of the courtroom. (Hr'g Tr. 71, May 12, 2010.) Earl Harrison ("Harrison"), Greene's minister, and his assistant, Lerone Hodge ("Lerone Hodge"), testified that they were with Krigger-Stephens when they were barred from the courtroom. Hodge stated that while entering the courtroom, he was approached by an individual who asked if they were jurors and upon his response of no, it was suggested that they leave the courtroom. (*Id.* at 41.) Harrison testified that he was asked if they were family members, and was told that unless he was a family member he had to leave th courtroom. (*Id.* at 32.)

Albert H. Richards Sr. ("Mr. Richards"), brother-in-law of Saldana, testified that an individual who was calling out jurors' names asked if he was a prospective juror. (*Id.* at 154.) After

---

retrial.

he responded that he was not a prospective juror, she told him he had to leave. (*Id.* at 155.) Jeanette Magras-Saldana("Mrs. Saldana"), wife of defendant Saldana, testified that she accompanied Richards and his wife, Felicita Saldana Richards ("Mrs. Richards") to court on January 25, 2010 (*Id.* at 198). Mrs. Saldana testified that she was stopped before she was able to get through the second courtroom door and was told that she, Mr. Richards, and Mrs. Richards, could not enter the courtroom. (*Id.* at 201.)

Mr. Greene's brother, Curtis Fredericks ("Fredericks") testified that someone he believed was a marshal told him he could not enter the courtroom on January 25, 2010. (*Id.* at 101.)

Other individuals testified that they saw a group of family members and acquaintances waiting outside the courtroom and upon hearing that these people had been denied entry, joined them in waiting to be allowed entry into the courtroom.(*Id.* at 88, 180.)

Though the testimony differs about the length of time during which individuals were barred from the courtroom, several individuals testified that they gained entry to the courtroom some time later that day without incident.

The Court also heard testimony from court staff and court

security officers[3] ("CSOs"). The court staff testified about both general practices of preparing and assembling a jury panel for jury selection as well as activities performed on January 25, 2010. CSO Hyram Graneau testified that on January 20, 2010 he told Fredericks that the courtroom was full and there was no available seating. (*Id.* at 295.) None of the CSOs testified that they had any similar conversation with a member of the public on January 25, 2010. CSO Alfredo James ("James") testified that he generally sought to keep the public separate from prospective jurors as part of his routine duties as a CSO. When asked if he carried out his perceived duty "to ensure that no member of the public was commingled with the jury panel" on January 25, 2010 he said he did, but did not testify that as part of fulfilling his duty he carried out any exclusion on that day. (*Id.* at 252-53)

The defendants now claim that there was an exclusion of individuals from the courtroom that violated their Sixth Amendment right to a public trial.

III. ANALYSIS

Pursuant to Federal Rule of Criminal Procedure 33[4], "a

[3] CSOs are not part of the Court's staff. They are under contract with the U.S. Marshal Service, an agency under the executive branch. They have a role to play, but are not part of the judiciary.

[4] In pertinent part, Federal Rule of Criminal Procedure 33 provides: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Civ. P. 33(a).

district court 'can order a new trial . . . only if it believes that there is a serious danger that a miscarriage of justice has occurred — that is, that an innocent person has been convicted.'" *United States v. Davis*, 397 F.3d 173, 181 (3d Cir. 2005) (quoting *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002)). Further, the "burden is on the defendant to show that a new trial ought to be granted." *United States v. Clovis*, 1996 U.S. Dist. LEXIS 20808, at *5.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. CONST. AMEND. VI. The assurance of a public trial "'is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . .'" *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (*quoting Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 380 (1979).

However, the Supreme Court in *Waller v. Georgia*, 467 U.S. 39 (1984), also recognized that the right to a public trial is not absolute. In some instances it must yield to other interests,

such as those essential to the administration of justice. *Id.* at 45. To ensure that lower courts strike the proper balance of interests, the Court adopted the following requirements: 1) a party seeking to close a court proceeding must advance an overriding interest that is likely to be prejudiced; 2) the closure must be no broader than necessary to protect that interest; 3) the trial court must consider reasonable alternatives to closing the proceeding; and 4) it must make findings adequate to support the closure. *Id.* at 48. Prior to embarking on a *Waller* analysis, "we must first determine whether the right attaches" in the circumstances at hand. *United States v. Ivester*, 316 F.3d 955, 958 (9th Cir. 2003).

It is axiomatic that a defendant's Sixth Amendment right to a public trial attaches from the commencement of trial, at voir dire. *Presley,* 130 S. Ct. at 724. Beyond a trial, there are few circumstances where the Sixth Amendment right to a public trial attaches. *See Waller*, 467 U.S. at 47 (recognizing the accused's right to public access to his pretrial suppression hearing). *But See Levine v. United States* ("Criminal contempt proceedings are not within 'all criminal prosecutions' to which that Amendment applies.")(citations omitted).

Here, the defendants specifically assert that members of the

public were excluded from *voir dire* and jury selection. They highlight the Supreme Court's recent discussion in *Presley v. Georgia*, 130 S. Ct. 721 (2010), noting that *voir dire* is a segment of a criminal prosecution firmly within a defendant's right to a public trial. Their argument, however, is belied by two obstacles. First, the alleged closure was neither Court ordered nor Court directed. Second, it is unclear in the record if the alleged closure occurred during a judicial proceeding to which the Sixth Amendment attaches.

In most cases where a defendant alleges that his Sixth Amendment right to public trial has been violated, a courtroom closure has been a readily apparent product of a court order or a court-directed protocol. *See, e.g.*, *United States v. Thunder*, 438 F.3d 866, 868 (8th Cir. 2006)(noting that a "total closure" of the courtroom occurred when the trial court granted government's motion for such closure during the testimony of alleged victims of aggravated sexual abuse); *Bowden v. Keane*, 237 F.3d 125, 128 (2d Cir. 2001) (detailing a closure that occurred after a trial judge granted the prosecution's motion for closure of the courtroom during an undercover witness' testimony); *United States v. DeLuca*, 137 F.3d 24, 32-34 (1st Cir. 1998)(finding that the marshal service's screening policy, requiring that all court

spectators provide written identification before being permitted to enter the courtroom, amounted to a "partial closure"). Here, the Court issued no order closing the courtroom or directing any court personnel to effectuate such a closure.

Where, as here, there is no record of a directive from the Court, a closure is still possible. *See, e.g.*, *United States v. Al-Smadi*, 15 F.3d 153, 155 (10th Cir. 1994) (describing a closure that occurred because it was the regular practice of the federal courthouse to close to the public at 4:30 p.m., and in the challenged instance, the court security officer failed to ensure the courthouse doors remained open past 4:30, even though a trial was in progress); *Martineau v. Perrin*, 601 F.2d 1196, 1200 (1st Cir. 1979)(finding a closure where "due to a misunderstanding by the court officer, the courtroom doors were locked for three days and part of a fourth of a six day trial"). Under those circumstances, determining whether an exclusion occurred requires a careful inquiry into the allegations presented and the circumstances under which an exclusion may have taken place.

In *United States v. Lipscomb*, 539 F.3d 32 (1st Cir. 2008), the Court of Appeals for the First Circuit found that a defendant did not adequately demonstrate that a violative closure had occurred. The defendant offered as proof of closure, an unsworn letter from an individual claiming he was barred from closing

arguments. The letter read: "'On the date of 10-5-05 I went to the federal court building to attend the closing arguments for Anthony Lipscomb. Arriving alittle [sic] late, when I got to the court room the door was locked and I wasn't able to enter.'" *Lipscomb*, 539 F.3d at 42.

The First Circuit found Lispcomb's evidence of a closure wanting. It did not consider an "unsworn and unsubstantiated declaration, alone . . . sufficient competent evidence to demonstrate that Lipscomb's Sixth Amendment right to a public trial was violated." *Id.* at 43. The Court further noted that the defendant did not allege that the closure was "intentional or that it occurred during the evidentiary phase of his trial . . . at most, the closure occurred after the end of witness testimony and the submission of trial evidence." *Id.*

The defendants here have presented sworn testimony and accounts of closure that exceed the conspicuously deficient proffer in *Lipscomb*. At the same time, however, their evidence of exclusion does not rise to the quantum or quality of definiteness found in cases in which closure was apparent on the record. Rather, this case falls somewhere in between those two examples.

The defendants have filed affidavits of family members and other members of the public which assert that those individuals

attempted to enter the trial on January 25, 2010 and were denied admittance by U.S. marshals or court room security officers. Those affidavits speak about the challenged closure in general terms, lacking specificity about the manner in which individuals were barred from the courtroom. For example, in his affidavit Mr. Richards asserts that:

> 3. On Monday, January 25, 2010, I attempted to enter the Courtroom during the jury selection and/or *voire dire* for the above-referenced case.
> 4. I was not permitted to enter the Courtroom during jury selection and/or *voire dire.*
> 5. I was permitted to enter said Courtroom only after the jury selection and/or *voire dire.*

(Aff. of Albert Richards, Attach. 2, Saldana Mot. for J. of Acquittal, Mot. New Trial.)

The other affidavits filed similarly pinpoint *voir dire* as the time when individuals were barred from the courtroom.

However, at the Court's evidentiary hearing, there was no consensus in the testimony of witnesses who had an opportunity to observe what was happening in the Court at the time of their alleged exclusion[5]. Krigger-Stephens testified that she did not

[5] Some of the witnesses gave speculative testimony about what occurred in the courtroom while they were allegedly excluded. For example, Mrs. Saldana testified that she was aware of what she was unable to witness during her exclusion because of her experience attending the first trial in this matter:

> Because during the December 14th trial, I was here, I saw the entire jury selection process. I was sitting right there. I saw everything. So this was only my second trial. I assumed the same way I was allowed in the first time I should have been allowed in the second time. And I wasn't.

"remember the time, but I know the same time when you come, like we were supposed to come to, for trial, it was, I think it was a Monday."(*Id.* at 103.) Mrs. Richards stated that when she arrived at 9:45 a.m. on June 25, 2010, family members were standing outside the courtroom and communicated that they had been excluded from the courtroom. (*Id.* at 180.) Mrs. Saldana testified that on January 25, 2010 she arrived at the courthouse at approximately 9:00 a.m., and was precluded from entering the courtroom at that time. (*Id.* at 198, 201.)

The testimony about the length of time of the alleged exclusion is similarly varied. Harrison testified that about an hour passed in between the time when he was urged to leave the courtroom and when he was told he was able to reenter the courtroom. (*Id.* at 21-22.) However, his assistant who accompanied him that day, Lerone Hodge, testified that he could not recall exactly what he did after he was barred from the courtroom, he and Harrison may have gone to lunch and then entered the courtroom in the afternoon without incident. (*Id.* at 48, 51). Krigger-Stephens, who testified that she had been excluded at the same time as Harrison and Lerone Hodge, at one point testified that she did not think the exclusion lasted "longer than five

---

(Hr'g Tr. 205, May 12, 2010.)

minutes," but then later stated that after she had been denied entry, she remained outside the courtroom for "longer than 15 minutes." (*Id.* at 76-77.) Mrs. Saldana testified that her exclusion lasted "[a]t least two hours."(*Id.* at 207.) Mr. Fredericks stated that "I can't give a number, but me -- more than a hour." (*Id.* at 111.)

The Court notes that prior to jury selection beginning, Court staff take attendance when assembling the jury panel. The Court's jury clerk, Kimberly Willett, described the general jury attendance procedure as follows:

> THE COURT: When you say attendance is taken, what do you mean by that?
> Tell us what you observe occurs or what you do.
>
> THE WITNESS: The jurors are called by their names, and they proceed to the table and receive their Juror Number.
>
> THE COURT: Tell us what else, if anything happens at that stage?
>
> THE WITNESS: After they receive their number they go back to their seats, and then after the whole jury -- everyone has received a number, then a random seating list is, is created within the system. And then I would come in and do my bio form.
> We distribute the paperworks to the attorneys and we await for the judge to come in after all the parties are called -- the parties, meaning the attorneys.

(Hr'g Tr. 18-19, May 18, 2010.)

In this Court, jury attendance is an administrative

undertaking performed by Court staff, much like the assignment of juror numbers. It takes place before the trial starts. No judge conducts jury attendance. Following the completion of jury attendance, the judge is called to the bench, and then presides over jury selection.

It is significant that none of the individuals, claiming that they were barred from the courtroom, who had an opportunity to observe the inside of the courtroom, referenced the judge being present at the time of their alleged exclusions. Ms. Krigger-Stephens did not recall a judge being on the bench at the time of her exclusion:

> THE WITNESS: I wasn't really paying too much attention. I saw people speaking, attorneys speaking, you know, but I wasn't really paying too much attention. I just came in and sit down and was waiting for whatever -- you know. I don't --
>
> THE COURT: When you say "speaking," were they speaking to a judge?
> Was there any judge in the courtroom?
>
> THE WITNESS: No, because I don't remember - that's what I was just about to say. I don't remember you being there.

(*Id.* at 75.) Mr. Richards testified that at the time he was urged to leave the courtroom prospective jurors' names were being called out:

> Q: Now, drawing your attention to the second trial involving Mr. Enrique Saldana, do you recall whether or not you attended the first day of that trial?

> A: Yes. I did.
>
> Q: And what do you, what do you recall, if anything, occurred on that day?
>
> A: After I got upstairs, I was accompanying his mother. She sat down outside, and I came -- excuse me.
>
> Q: Go ahead.
>
> A: And I came inside the court. When I got inside the court, all the benches were full of people. So there were no seats there.
> The little gate there was open. This, where the government attorneys are sitting, was moved over to the side. There were chairs there. The podium that you're standing to was turned around. So I came in and I sat down in one of the chairs.
> There was an individual calling out names. After about the fourth or fifth name, she turned to me and she said, "Are you a prospective juror?"
> I said to her, "No. I'm here for the trial."
> She said to me, "Well, I'm sorry, you can't be in here now. You have to leave."
> So I got up and I walked out.

(*Id.* at 154.) This testimony suggests that the exclusions of Krigger-Stephens and Mr. Richards took place prior to *voir dire*, while jury attendance was being conducted.[6] The Court also finds that for the several other witnesses claiming to be excluded

[6] The testimony from other witnesses who had the opportunity to observe the courtroom was vague about what was occurring prior to their exclusion. Harrison testified that he observed "[i]ndividuals gathering," when he entered the courtroom. (Hr'g Tr. 21, May 12, 2010.) Lerone Hodge testified that counsel was present but he did not recall any witnesses on the stand. When asked what he observed the people in the courtroom doing, he responded "[t]hey were just sitting." (*Id.* at 47.)

during the 9:00 a.m. to 10:00 a.m. window[7], the natural inference is that they too were merely denied access to jury attendance[8].

Further supportive of a conclusion that individuals were excluded from jury attendance and not jury selection, is the testimony from Fredericks that he witnessed at least a portion of jury selection when he was permitted to reenter the courtroom following his alleged exclusion:

> Q: What about -- did you observe any particular portion of that process taking place at the time that you entered the courtroom, that you were allowed to enter the room?
>
> A: What did I observe?
>
> Q: Yes.
>
> A: Well, I come in, the jury selection was in process. And I just sit down and, some person, a *person would say like, with a number, and they would say if they*

[7]The Court notes that Mrs. Saldana testified that she was not permitted entry until after 11:00 a.m. In light of the testimony of other witnesses, such as Richards and Krigger-Stephens, the Court does not find Mrs. Saldana's testimony alone to be persuasive evidence that the courtroom was barred to the public until 11:00 a.m.

[8] Testimony by some witnesses indicated that they were told that the exclusion was for the jury selection process. Kamika Thomas ("Thomas"), fiancé of Greene, testified that when she attempted to enter the courtroom on January 25, 2010 she was stopped by someone who told her "Well, no one is being allowed into the courtroom until after jury selection." (Hr'g Tr. 87, May 12, 2010. Harrison testified that a guard approached him and told him that unless he was a family member he could not remain in the courtroom during the jury selection process. (*Id.* at 31.) The Court notes that though many of the witnesses linked their exclusions to the jury selection period, when questioned further about the events of the trial they were excluded from viewing, the witnesses had difficulty recalling what was occurring in the courtroom at the time of their exclusion. Significantly, the general sense from these observations is that jury attendance — not *voir dire* — was taking place.

> *could stay on the case, if not, if they can't stay, and then the judge will have something to say*.

(*Id.* at 112.)(emphasis added)

Fredericks essentially described jury selection. *A fortiori*, it is apparent from the record that he attended jury selection. Thus, despite Fredericks' general claim of exclusion, it is probable that he was merely denied access from jury attendance.

The Court is unaware of any authority that would support an extension of a Sixth Amendment right to a public trial to a non-judicial event preceding trial, such as jury attendance. The Court does not find a basis upon which the defendants could validly claim they had a right to public access to the taking of jury attendance.

The Court is not insensitive to the impression of exclusion that may have emanated from the denial of the opportunity to be in the courtroom during jury attendance[9]. However, while the Sixth Amendment offers a significant guarantee of a public trial, it does not secure for the accused all-encompassing public access to pretrial Court administrative operations. For example, no one could reasonably claim that the Sixth Amendment secures the right

[9] Indeed, while there was no physical space other than the courtroom to conduct jury attendance for the number of potential jurors summoned, the Court now has secured added space outside of the courtroom to conduct jury attendance.

to have the public present in the Clerk's Office during the preparation of juror summonses. Moreover, the Court does not find that the perfunctory task of jury attendance implicates the prevailing values associated with a public trial, keeping triers of a case "'keenly alive to a sense of their responsibility and the importance of their functions . . . .'" and "encourag[ing] witnesses to come forward and discourag[ing] perjury." *Waller*, 467 U.S. at 46 (*quoting Gannett*, 443 U.S. at 380). While the Court does not foreclose the possibility that there are non-judicial proceedings that may be so intertwined with trial proceedings that a defendant's Sixth Amendment right to public trial is applicable, the Court does not find that the administrative action of jury attendance approaches such an event.

Even assuming *arguendo* that there was an inadvertent partial closure during *voir dire,* the Court must then consider whether such closure amounted to a violation of the defendants' Sixth Amendment rights.

"In a system where public trials are the rule . . . not every improper partial closure implicates" the concern that a trial not conducted wholly before the public undermines its fundamental fairness. *Brown v. Kuhlmann*, 142 F.3d 529, 536 (1st

Cir. 2008). Several courts have found inadvertent, brief closures not to offend an accused's Sixth Amendment right. *See, e.g., Bowden v. Keane*, 237 F.3d 125, 129 (2d Cir. 2001)(noting that the right to public trial "is not trammeled . . . by a trivial, inadvertent closure"); *Al-Smadi*, 15 F.3d at 155 (determining that the inadvertent closure of twenty minutes of trial at the end of a court day that was "unnoticed by any of the trial participants," did not violate the Sixth Amendment). *But See Owens v. United States*, 483 F.3d 48, 63 (1st Cir. 2007)("even if the courtroom was closed because of inattention by the judge, courts have expressed concern in the past where a court officer's unauthorized closure of a courtroom impeded public access.") (citations omitted)); *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004) (finding a Sixth Amendment violation where trial ran late into the evening, foreclosing attendance of the public, because "[w]hether the closure was intentional or inadvertent is constitutionally irrelevant"); *United States v. Keaveny*, No. 98-1605, 1999 U.S. App. LEXIS 3630, at *4 (1st Cir. 1999) ("constitutional concerns may be raised even by a court officer's unauthorized partial exclusion of the public.").

In *Peterson v. Williams*, the trial court had properly ordered the court cleared during testimony of an undercover

police officer. 85 F.3d 39, 41 (2d Cir. 1996). Due to an "administerial mistake" the doors were not reopened for the defendant's testimony, which immediately followed that of the undercover officer. *Id.* The defendant's testimony was brief, and he denied the charges against him. *Id.* "Before summation, defense counsel moved for a mistrial, saying that she had 'just noticed when we stood up to start summations, that the courtroom was being unsealed for the very first time . . . .'" *Id.*

The trial court reserved decision on the mistrial motion, and later made the following findings of fact: (1) the closure was an administerial mistake, (2) the defendant's testimony was only 15 or 20 minutes long (3) court officers opened the door for individuals who sought entry upon hearing someone at the door, and (4) the individuals who were asked to leave and later sought re-entry were not associated with the case, but were individuals who often visit courtroom. *Id.* at 41-42.

On review, the Second Circuit articulated a widely cited and followed "triviality standard,"[10] saying,

> the unjustified closure that occurred was too trivial to amount to a violation of the Amendment. A triviality standard, properly understood, does not dismiss a defendant's claim on the grounds that the defendant was

[10] This nomenclature is unfortunate. While this Court might prefer to refer to a *de minimis* standard, the *Peterson* "triviality standard" is frequently referred to by federal courts.

> guilty anyway or that he did not suffer "prejudice" or "specific injury." It is, in other words, very different from a harmless error inquiry. It looks, rather, to whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant -- whether otherwise innocent or guilty -- of the protections conferred by the Sixth Amendment.

Id. at 42. The court noted that,

> [t]he Supreme Court has described the values furthered by the public trial guarantee as four: 1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury.

Id. at 43 (citing *Waller*, 467 U.S. at 46-47).

The court found that none of those values were seriously implicated by the closure that occurred. In conclusion, and expressing its very narrow but oft-cited holding, the court said "[w]e only hold that in the context of this case, where the closure was 1) extremely short, 2) followed by a helpful summation, and 3) entirely inadvertent, the defendant's Sixth Amendment rights were not breached." *Id.*

The Tenth Circuit reviewed a case in which, consistent with regular practice, the courthouse was locked after normal working hours at 4:30 p.m. *United States v. Al-Smadi*, 15 F.3d 153, 154 (10th Cir. 1994). As a result, defense counsel's wife and child were unable to gain access to the courtroom. *Id.* At 4:50 p.m.,

the trial adjourned. *Id.*

The Tenth Circuit reasoned that,

> [t]he denial of a defendant's Sixth Amendment right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom. . . . The brief and inadvertent closing of the courthouse and hence the courtroom, unnoticed by any of the trial participants, did not violate the Sixth Amendment.

United States v. Al-Smadi, 15 F.3d 153, 154-155 (10th Cir. 1994) (citing *People v. Peterson*, 611 N.E.2d 284, 285 (N.Y. 1993); *People v. Colon*, 521 N.E.2d 1075, 1078 (N.Y. 1988)).

Another inadvertent closure occurred in *Snyder v. Coiner*, 510 F.2d 224 (4th Cir. 1975). In that case,

> [t]he record shows that during the summations of counsel, access to the courtroom was limited. This limitation was apparently brought about by the misunderstanding, by a deputy sheriff, of a request by the court that a deputy be posted at the door of the courtroom in order to keep any noise or disturbance at a minimum. The deputy thought that he was to keep people from going in or out of the courtroom during final arguments. As a result of this misunderstanding, the deputy denied access to members of the press and possibly others. It is not clear from the record whether or not any spectators were in the courtroom during the summations.

365 F. Supp. 321, 323 (N.D. W. Va. 1973), *aff'd* 510 F.2d 224.

The Fourth Circuit found that the,

> condition existed for but a short time and was quickly changed by the Court, when advised of the action of the bailiff. The bailiff, in acting as he did, merely

> sought to prevent any disturbance during the arguments. There were no restrictions placed on the defendant, his counsel, family or witnesses or even spectators then in the courtroom. The incident was entirely too trivial to amount to a constitutional deprivation.

510 F.2d at 230.

However, inadvertence, does not preclude the occasioning of a Sixth Amendment violation. In *Owens v. United States*, 483 F.3d 48, 54 (1st Cir. 2007), prior to jury selection, the Court had a colloquy with a U.S. Marshal about courtroom seating during jury selection:

> Court: We're going to get 72 jurors in here. That will mean we'll have a number of jurors. Now, let me ask the marshals. It looks like we're going to need all the rows except for this first row [where the defendants were seated]. Is that going to be sufficient for you?
> Marshal: I think so, your Honor. I spoke to [the courtroom deputy] about it, and I was going, I'll have the officers and myself and the other fellows with me stand off to the right, make sure all the jurors get seated and have whatever spectators leave until there's a sufficient amount of room.
> Court: We'll need every seat with 72 people. All right.

There was no objection offered at that time. *Owens*, 483 F.3d at 54. The marshals then cleared the courtroom and only allowed prospective jurors entry. *Id.* As the jury selection process progressed and jurors were dismissed, courtroom seating became available. *Id.* Despite such openings, the defendant's family

claimed that the marshals continued to bar them from the courtroom for the entirety of jury selection which spanned one full day. *Id.* Subsequently, Owens challenged this closure of the courtroom as violative of his Sixth Amendment right to a public trial.

The government countered that any closure was trivial and inadvertent. *Id.* at 62. The Court in *Owens* found that the exclusion was not trivial, in that the courtroom "was allegedly closed to the public for an entire day while jury selection proceeded." *Id.* at 63. It further highlighted that "[j]ury selection is, of course, a crucial part of any criminal case." *Id.* at 63. The Court also did not find dispositive the judge's passive role in the continued closure, noting "even if the courtroom was closed because of inattention by the judge, courts have expressed concern in the past where a court officer's unauthorized closure of a courtroom impeded public access." *Id.* (citations omitted). The Court therefore noted that "if the trial court barred spectators from the courtroom, as Owens alleges, he was denied his Sixth Amendment right to have a public trial." *Id.* at 63.

To the extent the alleged closure extended beyond jury attendance and included a portion of *voir dire*, that occurrence

was similar to the closures found trivial in *Al-Smadi* and *Petersen*. Notwithstanding the First Circuit's discussion of the issues related to closure during *voir dire* in *Owens*, the events that occurred here did not attempt to cloak the jury selection process in secrecy. Significantly, this case can be distinguished from *Owens* on the grounds that Fredericks' testimony supports an inference that the public was permitted to witness jury selection. The Court does not find that any exclusion that occurred rose to a level where the defendants' Sixth Amendment rights were violated.

Finally, the government argues that the defendants forfeited their right to a public trial by failing to object to a violation of that right at trial. A defendant's Sixth Amendment right to a public trial is subject to waiver. *See, e.g.*, *Singer v. United* States, 380 U.S. 24, 35 ("[A] defendant can, under some circumstances waive his constitutional right to a public trial . . . ."); *United States v. Sorrentino*, 175 F.2d 721, 723 (3d Cir. 1949)(noting that consistent with the principle that a defendant should have the right to determine that his interests may be best aided by not exercising a right, such as the right to a trial by jury, "[w]e think that the same considerations apply to the right to a public trial and that a defendant may waive that privilege

also."); *Johnson v. Sherry*, 586 F.3d 439, 444 (6th Cir. 2009)(noting that a right to a public trial "can be waived when a defendant fails to object to the closure of the courtroom, assuming the justification for the closure is sufficient to overcome the public and media's first amendment right to an open and public trial proceeding."); *Crawford v. Minnesota,* 498 F.3d 851, 854 (8th Cir. 2007)(observing that though the right to a public trial is a structural right, it may be waived)(internal citation omitted). The government's argument is flawed in several respects. Generally "the control of the conduct of [an accused's] defense [is] confided in [counsel] and they [are] authorized to speak for him in matters such as this." *Sorrentino*, 175 F.2d at 723. However, such authority rests with an attorney with the understanding that there will be a dialogue between client and attorney about the client's rights. Absent such sharing of information, a defendant cannot necessarily be prejudiced by counsel's malfeasance. Of course, the Court need not reach the issue of forfeiture in light of its finding that the defendants have failed to establish a violative closure.

The government's forfeiture argument, however, did bring to light a most troubling occurrence which the Court feels obligated to address. At the evidentiary hearing, Fredericks' testimony suggested that an officer of the court may have been aware of

claims of exclusion and deliberately chose to sit on this information. Fredericks recounted a conversation he had with Assistant Federal Public Defender, Jesse A. Gessin, outside the courtroom in St. Thomas after Fredericks' alleged exclusion:

> MR. LINDQUIST: So Gessin told you -- Attorney Gessin told you to come to the Public Defender's Office to sign this affidavit.
>
> A: He told me -- this is exactly what he told me. He told me, You guys got put out again -- I mean, "you guys was outside again?"
> And I say "Yeah"-- I told him, "Yeah," you know what I mean?
>
> MR. LINDQUIST: All right. So --
>
> A: And then he say, "There's a law against that."
>
> . . .
>
> THE COURT: . . . When you had your discussion with Mr. Gessin, which trial was it that you had that discussion?
>
> THE WITNESS: The third one.
>
> . . .
>
> THE COURT: All right. Now you said that Mr. Gessin had a paper. And what was that paper?
>
> THE WITNESS: No. He say it have a paper with a Supreme Court ruling, and he'll have to go and thing it up so I could read it; that something had happened similar to what happening to me now.

(Hr'g Tr. 131-32, 140, May 12, 2010.) Though the Court makes no assessment about whether Attorney Gessin's knowledge and failure to object could have effectuated any waiver by the Office of the

Federal Public Defender's client, Greene, the Court does not find the conduct detailed in Frederick's testimony to be that befitting a member of the Virgin Islands Bar[11]. If an officer of the Court perceives what she believes to be a closure, an appropriate response would be to inform the Court of a possible denial of access to the courtroom. Allowing trial to progress and an exclusion to continue in hopes of later profiting from that infringement seems to run the unwise risk of neglecting to safeguard a client's rights at trial in favor of "rais[ing] an abstract claim . . . as an afterthought on appeal." *Levine v. United States,* 362 U.S. 610, 620 (1960).

IV. CONCLUSION

For the reasons given above, the Court will deny the defendants' motions for a new trial. An appropriate Order accompanies this memorandum opinion.

S_____
CURTIS V. GÓMEZ
Chief Judge

[11] In connection with the Court addressing the defendants' public trial motions, the Court ordered the Office of the Federal Public Defender to file a briefing about Attorney Gessin's conversation with Fredericks and when the Office became aware of the alleged exclusion. The Court notes that Attorney Gessin's response was evasive and singularly unhelpful to the Court's inquiry.